

Sieherman

T

15479

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548**

FILE: B-198726
B-198792

DATE: November 19, 1980

MATTER OF: Education Service District of
Washington County

DL605526

DIGEST:

[Protest of Negotiated Contracts Award]

Although responsibility for administration and enforcement of Service Contract Act rests with Department of Labor, not GAO, protest is sustained where protester is denied opportunity to prepare offer and have it evaluated on common basis because solicitation contained wage determination and required inclusion of budget breakdown by category of labor and rate of compensation, but agency in evaluating offer ignored inclusion by awardee of compensation rates which indicated failure to comply with wage determination.

Education Service District of Washington County (ESDWC) protests the award by the U.S. Department of Agriculture, Forest Service (Forest Service), of two negotiated contracts to EDGE, Inc. (EDGE), under solicitation Nos. R6-80-41 and R6-80-147. Both awards are for contracts under 16 U.S.C. § 1703(c) (1976) to operate Youth Conservation Corps (YCC) camps, and both contracts have been performed.

AGC00034

ESDWC asserts that: (1) EDGE is not eligible for award since it is not a private nonprofit organization which has been in existence for 5 years as required by the act and the solicitation; (2) EDGE represented in its proposal that it had operating arrangements with Southern Colorado University when no such arrangements existed; (3) EDGE did not submit an offer adequate to meet the minimum requirements of the contract; (4) EDGE fails to provide certain employee benefits which are required by law; and (5) EDGE's proposal indicated on its face that its staff salaries did not comply with the Service Contract Act (SCA) wage determination which was included in the solicitation, but the agency ignored this in evaluating and awarding the contract despite the specific solicitation requirement of inclusion of wage rates by labor category.

~~013006~~ 113797

We agree with ESDWC's final contention. Therefore, we need not consider the other contentions. Lawrence Johnson & Associates, Inc., B-196442, March 11, 1980, 80-1 CPD 188.

The solicitations in question included SCA wage determinations and required that:

"The price proposal * * * shall include an itemized breakdown of the project price, including types or categories of labor, together with person-hours for each category indicating rate of compensation for each unit."

EDGE's proposal indicated that for at least one job category ("assistant cook") it would not pay a compliant salary. EDGE expressed its rate by a range rather than a fixed rate, but for the "assistant cook" category it would be noncompliant even if it were to pay at the highest rate in the range. For certain other labor categories it would be noncompliant at the lower end of its stated salary range, but possibly compliant at the upper end. While EDGE has asserted that, in fact, it did pay compliant salaries over the course of the contract, the salaries which it contends were paid do not comport with those stated in its proposal.

We have consistently held that administration and enforcement of the SCA rest with the Department of Labor and not with our Office. Massa Flooring Co., Inc., B-187974, January 19, 1977, 77-1 CPD 40; SIMCO Electronics, B-187152, August 31, 1976, 76-2 CPD 209. However, in this case, the effect of the Forest Service's procurement practices in this respect has been to effectively prevent the protester from competing on an equal basis with the awardee. Thus, the question with which we are concerned is not that of enforcement, but one of the propriety of the agency's use and evaluation of the express solicitation requirements.

The Forest Service concedes that there is some question regarding EDGE's compliance with the wage determination levels based on the rates allotted in EDGE's proposal. However, [the Forest Service contends that the applicability of the SCA to this type of contract is an unresolved question currently being considered by the Department of Labor. The agency further asserts that the evaluation criteria do not provide for evaluation of the budget proposal in determining the award.] The latter position is contrary to the solicitation terms. While it does provide for technical evaluation separate from price

evaluation, it also requires submission of a price proposal, including the above-quoted rate of compensation requirement, and it provides 160 points maximum for the technical proposal and 350 points maximum for the price proposal. The solicitation states that: "Award will be made to the responsible offeror whose proposal deemed technically acceptable and within the competitive range will be the most advantageous to the Government price and other factors considered." Thus, the budget proposal was critical in determining the award.

In effect, despite the Forest Service's apparent reservations about the applicability of the SCA, the solicitation contained the SCA wage determination and provided a mechanism for evaluating to assure that proposals were compliant. Consequently, the agency effectively elected to waive the requirement by ignoring the noncompliant wages provided in EDGE's proposal. The result was to penalize offerors whose proposals reflected higher salary costs in order to be compliant with the solicitation requirements.

It is a fundamental principle of Federal procurement law that a solicitation must be drafted in such a manner that offers can be prepared and evaluated on a common basis. Compu-tek Inc.; Ontel Corporation, 54 Comp. Gen. 1080 (1975), 75-1 CPD 384; Lawrence Johnson & Associates, Inc., *supra*. To that end, Federal Procurement Regulations (FPR) § 1-3.805-1(d) (1964 ed. amend. 153) provides:

"When, during negotiations, * * * a decision is reached to relax, increase or otherwise modify the scope of the work or statement of requirements, such change or modification shall be made in writing as an amendment to the request for proposals, and a copy shall be furnished to each prospective contractor. * * *"

In this case, the Forest Service waived the SCA wage determination levels for EDGE without advising any offerors of this waiver. We believe that this impropriety deprived the other offerors of an opportunity to compete on a common basis.

Since the contracts for the YCC programs have been performed, no meaningful relief is possible. However, the contracts provide for renewal at the option of the Government for two additional YCC programs. We recommend that these

B-198726
B-198792

4

renewal options not be exercised. In addition, prior to issuing any new solicitations, the Forest Service should ascertain definitively the applicability or inapplicability of the SCA to the YCC program operation contracts and structure the solicitation and evaluate the new proposals accordingly. By separate letter of today we are advising the Secretary of Agriculture of the defects in this procurement and of our recommendation.

The protest is sustained.

Henry R. Van Cleave
For the Comptroller General
of the United States